EXHIBIT D

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE:	.	Chapter 11
	.	
AMERICAN HOME MORTGAGE	.	Case No. 07-11047(CSS)
HOLDINGS, INC., a Delaware	.	
corporation, *et al.*,	.	
	.	Oct. 8, 2008 (9:42 a.m.)
Debtors.	.	(Wilmington)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE CHRISTOPHER S. SONTCHI
UNITED STATES BANKRUPTCY COURT JUDGE

Proceedings recorded by electronic sound recording;
transcript produced by transcription service.

THE CLERK: All rise.

THE COURT: Please be seated.

MR. BRADY: Good morning, Your Honor.

THE COURT: Good morning.

MR. BRADY: Robert Brady -

THE COURT: Before we get started, we will have to take what I hope will be a very, very short break, 10 - 10:15 to deal with my 10 o'clock which should be resolved, but go ahead.

MR. BRADY: Very well, Your Honor. Let me just begin, Your Honor, by apologizing for the confusion on the start time of today's hearing. Our original agenda said 9:30. I looked back at my notes from the teleconference which reflected 9. We tried to file an amended agenda, but it did create confusion, but I think by starting later it's always better than starting earlier.

THE COURT: Right, well, I thought we moved it to 9:30 to accommodate the New York attorneys, but I don't actually recall exactly.

MR. BRADY: With that, Your Honor, I believe first on the agenda today is the motion for the formation of a Borrower Committee so I yield to Mr. McCauley.

THE COURT: Okay, thank you. Mr. McCauley, good morning.

MR. McCAULEY: Good morning, Your Honor. Thomas

McCauley on behalf of 11 different individual borrowers in this case. I'm here with Stephen Weisbrod and, Your Honor, we've divided the argument - effectively the parties agree that there's effectively a two-part analysis, one is the statutory requirement of adequate representation or lack thereof, and then second is the discretionary factors that the Court might consider in addressing whether to appoint a committee, and Mr. Weisbrod's going to take the first part, if that's okay.

THE COURT: Yes, fine, thank you. Are we going to have evidence?

MR. WEISBROD: There will not be evidence, Your Honor.

THE COURT: Okay, thank you.

MR. WEISBROD: Thank you for having me this morning, Your Honor.

THE COURT: Good morning.

MR. WEISBROD: Stephen Weisbrod on behalf of the borrowers from Gilbert Randolph LLP. I'm also here with Ms. Paula Rush who is represented on this matter but not on the disclosure statement and Hunter Winstead who is an associate with my firm. We're here this morning because borrowers' interests in estate property have not been adequately represented. That's reflected in the plan, in the disclosure statement, and in the way that the parties involved in the

case have addressed potential third-party claims and other claims to date. The debtors and the Committee -

THE COURT: Well, let me stop you right there.

MR. WEISBROD: Yes.

THE COURT: Can you put some meat on your statement just there, borrowers' interest in estate property. Can you tell me what that is?

MR. WEISBROD: As Your Honor will recall, we noted eight different problems with the plan. Of those eight, seven relate specifically to how estate property will be distributed in one fashion or another. The eighth, which is the only one that the debtor has since addressed, is the only one that dealt principally with claims by the borrowers against other entities. The other seven are still problems, and they all relate to the borrowers' interests in estate property, how borrowers' claims on estate property will be handled, how estate property will be distributed. Let me begin by noting the notice problem in the bar date.

THE COURT: Well, wait a minute, wait a minute. Let's back up again. What are the interests -

MR. WEISBROD: The interests -

THE COURT: - that borrowers have in estate property. I'd like you to articulate that.

MR. WEISBROD: The borrowers have claims on estate property because they allege that they have been victimized

as a result of torts and statutory violations. So they have an interest in getting paid out of the estate. That's a fundamental interest in estate property. Now, it goes beyond that because there are non-monetary interests in how the estate will be handled that also matter, but I think even on the narrowest definition, and we don't completely agree with the U.S. Trustee on this point or the Committee that there's a distinction between claims on the one hand and interest in the estate on the other. We don't agree with that distinction, but even on the narrowest possible definition, will you get paid out of the estate, the borrowers have interests that are being adversely affected by this plan. They also, of course, have interest in voting and being properly informed. They have an interest in making sure that their payments out of the estate are properly weighted compared to other creditors, by which I mean that even if the borrowers' claims were fully allowed, if other claims that shouldn't be fully allowed are in fact allowed, that adversely affects borrowers' interest in the estate property.

THE COURT: Okay. You can proceed. Thank you.

MR. WEISBROD: The first and most glaring issue was, of course, the notice issue. The debtor and the Committee apparently agreed that newspaper notice was sufficient, and the debtor asserts that it was okay because they didn't know that these claims existed. Well, number one, it was pretty

obvious that a lot of claims were going to result because of the large number of foreclosure proceedings. They didn't give individual notice to people involved in foreclosure proceedings. They didn't give notice individually to people who had particular types of loans that very frequently spawned complaints. There had been even with the deficient notice, 450 claims, but those people didn't all necessarily get notice of the bar dates and other events in the case, and as to the thousands of other borrowers there's clearly a huge problem, and the debtors don't have a very good explanation for this given that they had the names and addresses of all these potential claimants. On top of that, and we didn't even know this until we read the debtors' pleading, but there is an open letter to all borrowers on the debtors' website, which was still there as of last week, that says, You won't be affected by the bankruptcy case. So there's actually not only a failure of notice but a misleading statement made to the world on this point, and that affects, obviously, a borrower's ability to collect from the estate. If they never submit a claim, they won't collect. The second point we raised with respect to the plan is that the plan would establish a conflicted trustee, and I'd like to list them all first, and then go back to some individually because that's a complicated issue, Your Honor. But the point briefly about how the trustee issue and the trustee issue affects estate

distribution is that the trust is going to be able to determine claims and going to be able to decide whether to prosecute claims either against borrowers or against others, which would affect ultimately how much borrowers recover and would affect what positions the trust is taking as to things like the legality of particular types of mortgages or particular transactions. The third issue is the classification issue. That's a classic issue of borrowers or any creditor who asserts that he or she has been improperly classified, has an interest in the estate, and classification bears on that directly. The next issue we identify relates to the treatment of financial institution claims. This has a number of elements to it. Number one, how will defenses to financial institution claims against the estate be addressed? As we pointed out in our pleadings, Your Honor, every time there is a borrower, a mortgagor, who says my mortgage was originated improperly, illegally, in violation of TILA (phonetical), there is a corresponding issue with the financial institution claim. When the financial institution claim says, American Home, you've reached your warranty to me that the borrower would pay, if the borrower has a valid defense based on TILA and the financial institution knew it, then the borrower's claim is the claim that should be paid and the financial institution's claim should not be paid or should at least be discounted, I mean, I think in practice

all of these claims will be resolved through settlement, almost all, but the point is that these are factors that have to be considered. There is a matrix which involves a claim form that financial institutions will fill out to request money from an estate, payment on these types of claims, early payment default and breach of warranty claims. We haven't seen that. We don't know whether it will reflect borrowers' defenses, and we don't know, ultimately, how the claims of the financial institutions will interplay with the borrowers' claims, and there's a big tension between who's going to make these decisions and borrowers' interest here because financial institutions will be the dominant force on the POC and the Trustee will answer to them. The next issue we point out as one of the basic issues is equitable subordination, and that hasn't been addressed, as far as I can tell, in any of the pleadings at all, but it's a classic issue of priority here which bears on borrowers' interest in estate assets. If there are some financial institutions whose claims should be subordinated, subordinated either to borrower claims or to all other unsecured claims, then that's an issue that will affect how much each gets paid. And again, that's something that ultimately might be worked out in a settlement, but it doesn't appear to have been addressed, at least not with any input from borrowers. The substantive consolidation issue is the second to the last one that they haven't addressed, and I

think that there is a gut reaction to that, that, Hey, this is an issue that affects all creditors in exactly the same way. After all, everybody is going to be subject to a plan that will not involve substantive consolidation and will resolve contribution claims according to a formula. But that may affect different types of creditors very differently. For a bank that gets cross-guarantees from every single debtor it may not matter. The bank even may get potentially, I don't know the facts, but could conceivably get a hundred cents on the dollar even if other creditors weren't going to get that if the bank had sufficient cross-guarantees from a large net number of debtors. The plan provides that no one can get more than a hundred cents on the dollar, but that's the cap. If you are a borrower and have a claim against only one entity, one debtor, then you're affected significantly by the absence of substantive consolidation because you only get potentially from that one entity unless you can pierce the corporate veil, which is complex litigation that most individual borrowers can't undertake by themselves. So this is an issue that can have a dramatically different affect on borrowers and their recoveries from the estates even though it theoretically treats everybody, in quote, "the same way". The last point, which has not been fully addressed, is that the plan dramatically affects how borrowers will prosecute their claims, and the plan contains inconsistent provisions

on this, but I think it's important to go through it and see just how dramatic this is. First, as I mentioned, there's the bar date issue, but then the trust mechanism is labyrinthian from the pont of view of borrowers. The Trustee, apparently, gets to determine the claims, at least according to Article 8(f)(5) - I can't read my writing, (b)(11), I think it is. The Trustee also gets to compromise them. There's no clear provision that says that this Court will have a role in that, but there's another provision that says that certain claims can be prosecuted - not clear if that includes borrower claims, but if they're going to be prosecuted they must be prosecuted in the Bankruptcy Court. That's very difficult for borrowers in Oregon, North Carolina, Ohio, et cetera, and that's not what you ordinarily see outside of bankruptcy. On top of that, the injunctions, both the continuation of the automatic stay and the so-called plan injunction, can have a very significant effect on borrowers, and let me go through this, because I think at first glance it may look like the debtors actually solved this problem, but they didn't, and it's very important to note how they didn't. The effects of these injunctions and automatic stay are very different depending on whether the mortgage is currently still held by the debtors or whether it's held by a purchaser from the debtors, someone who may have purchased the loan through a 363 sale. If the loan has

already been sold, then the so-called plan injunction applies. Nobody can sue, and there's no provision in the plan for getting that injunction lifted, by Your Honor or anyone else. It's just flat out, nobody can sue. If you look at the redline you'll see that there is an exception to that injunction. A borrower can sue if the borrower is subject to a foreclosure proceeding and if the foreclosure proceeding was brought by a so-called protected party, which means one of the debtors or the plan trustee. So if the foreclosure proceeding was brought by any of the many banks that have purchased loans, the plan injunction as currently formulated, does not allow a borrower to sue the trust. It's flat out prohibited, as I read it. Now, if the trust still owns the mortgages or if one of the debtors still owns the mortgages, then there is a presumptive - then there is an exception, that's in the plan injunction, so the plan injunction is no longer a factor. There's still the automatic stay, that also is presumptively lifted, but the deemed lifted language actually is not written in English. It's hard to say what it does and what it doesn't do. I'm sure that's just a scrivener's error, and it probably can be fixed, but even if it's lifted, the action can only be filed in the United States Bankruptcy Court for the District of Delaware. So you've still got the problem that we addressed in our initial pleadings, which is that borrowers are running

to court in Oregon, North Carolina, Ohio, Illinois trying to prevent foreclosures and they also have to sue here. That's hard. Now, Your Honor, that is not, as I emphasized, just a matter of protecting borrowers' rights because they are trying in these contexts to get money out of the estate. They're trying to get non-monetary relief from the estate or from the trust in the form, potentially of recession of the loans. So it matters to them and it's an interest just like any other interest in estate property in the functioning of these companies. There's another problem, Your Honor, with how the debtors' interest in getting their distributions are handled. If you notice, Your Honor, the plan provides for interim distributions and then a final distribution and the Trustee is supposed to reserve for that. The financial institutions will, presumably, get interim distributions. A claimant only gets an interim distribution if it's been allowed. The borrower claims won't be. The financial institution claims, at least the early payment defaults and so on, will be presumably processed efficiently. That's unfair right there. In addition, the Trustee is the person who decides, the plan Trustee is the person who decides whether the reserve is sufficient. It's got to be, quote, "reasonable" under the plan, but there's no requirement of any kind of finding that the reserve is reasonable. There's no provision anywhere that establishes a process by which

that reserving has to occur, and nobody knows whether any reserving will be done at all for borrower claims or if so how much it will be. The net result is that the estate may be substantially out of money before borrower claims are even liquidated, and all of this will be decided by the biased Trustee operating under the supervision of the POC. The problems that I mentioned are also evidenced in the disclosure statement, Your Honor, and we listed a litany, most of those actually were addressed by other creditors as well. I want to focus on the ones that uniquely apply to borrowers. First, How will their claims be handled? The disclosure statement doesn't clarify the plan in any way. No borrower could look at that disclosure statement and have any comprehension of how his or her claims would be handled under the plan. Second, Where are the loans? No borrower is currently finding out where the loans are, and that affects how their claims with respect to the loans are treated, because as I explained, the injunctions apply differently to loans depending on whether they are loans currently held by debtors or loans that have already been sold by debtors. You can't find out even if you want to. The issue of the claim form still hasn't been disclosed, to my knowledge, unless it was disclosed very recently, and there's nothing in the disclosure statement that explains how defenses to financial institution claims will be handled, which are critically

important to borrowers as well as the financial institutions. I may be mistaken, but I haven't seen a liquidation analysis of any kind let alone one that would differentiate among how borrowers' claims are going to be handled versus other claims, and that's a real difference given the different mechanisms for resolving these claims. The Trustee isn't identified, which is important to borrowers, and the effect of intercompany claims on borrower interest is not explained - the effect of the resolution is not explained. So those are among the most important ways why borrowers' interests in the estate are not being adequately protected now. And I'd like to turn to why the Committee and the debtor are not in a position to make it better. Now, you wouldn't necessarily expect a debtor to completely look out for borrower claims in these interests because after all the borrowers are suing or are filing claims against the debtor, but a Committee, you might in some cases, but this case is a lot like cases involving asbestos, breast implants, medical malpractice claims against hospitals, all of these are types of situations where multiple unsecured creditors have the same priority but they have very different interests in how estate assets are going to be handled and distributed. And that's why you so commonly see special committees appointed to represent asbestos claimants, breast implant recipients, physicians who performed the breast implant procedures in Dow

Corning, or in many hospital bankruptcy cases, malpractice claimants. Their view of how the assets should be handled are fundamentally different, and you can see that, that difference in perspective has permeated in this case. We quoted a couple of the remarks of Committee counsel about how borrower claims are just efforts to get out of their financial obligations, which I don't think is a fair way to describe these claims at all. I mentioned that the law firms representing the Committee while excellent firms, I have no quarrel with their abilities, their morality, their ethics, anything else, but they aren't bank firms. There's no way that a firm - Hahn & Hessen is one of the most prominent bank firms in New York. I mean I've just put on a program for the New York City Bar Association where I invited somebody from that firm to talk about the bank perspective. They're well known in that area. They're not going to look out for consumer interests. And you can see this then on how particular disputes are going to be coming up in this case and how the perspectives will be radically different. Were the mortgage terms legal? Were the interest rates too high? Should the mortgages be rescinded? Are any other entities palpable for fraud or other misconduct by the debtors? All these issues are bound to come up if this case is handled properly and have to be addressed with borrower input, sophisticated, well-represented borrower input. And that

applies, of course, to equitable subordination and other types of claims, and you can see what a difference it can make just by looking at the First Alliance case where a Borrowers Committee was appointed and there was a successful prosecution of an aiding and abetting case against a major creditor of the debtor in that case, Lehman Brothers. Your Honor, I think it's also important to address head-on this issue of, Are these claims just personal claims by a few individuals or is this really a major constituency? At a minimum we have 450, that's what the debtors report, 450 claims. There may be thousands more. They are generally not represented in these cases at all. In their claims in their state courts, they're represented usually by Legal Aid lawyers or small firm lawyers. These are not people represented by large malpractice or asbestos tort claimants firms. They can't do it on their own. Paula Rush has done a fine job especially advocating for the insertion of 363(o) language, but on these issues that I've just been talking about, *pro se* litigants can't do it, and I, therefore, disagree with the suggestion in the Committee's papers and in the debtors' papers that there has been gamesmanship or somebody waited until an opportune moment to file this motion. Well, that's not what happened at all. I think the Court should know how this all came about. It's really quite remarkable that these borrowers are here at all. It's not

that somebody waited or conspired to interfere with the process. In most cases, the Court knows, no borrowers came forward and asked for a Committee. It's really almost happenstance. I and my colleagues at Gilbert & Randolph represent a number of housing organizations. Zuckerman Spaeder represents a number of attorneys general and housing organization on *pro bono* matters, and in the course of casual conversations we realized that there was this issue out here, and over the last few months, we mentioned it to them and eventually borrowers came to us. They got signed up. They came to us in August and engaged us in August and September to do this. They're represented by Legal Aid lawyers, many of whom have no experience at all in Chapter 11 cases. That's why this happened, and it almost didn't happen. You had to get law firms willing to do this *pro bono*. You had to get law firms who knew how to handle - knew something about Chapter 11, and you had to get the individual borrowers from around the country to sign up if they were interested, and as you saw, a dozen did sign up. There have actually been 450 claims files, but that's not a conspiracy to derail the case or persecute these institutions or this debtor. That's just how it came about. It should be a surprise that it happened at all. It shouldn't be something that is held against unsophisticated borrowers. Your Honor, since there's so much else to be done in this case, we're not saying that Your

Honor has to agree with all our plan objections and finds that they are valid now or that that Your Honor has to find that particular subjects have to be addressed in the disclosure statement or that Your Honor has to find that there should be equitable subordination claims. We're merely saying that these are real issues. They affect the borrowers' interest in the estate as well as the borrowers' other interests, but they really do affect the borrowers' interest in the estate and that affects where they live, whether they can stay in their homes, et cetera. With so much left to be done here, we respectfully ask Your Honor to appoint a committee and my colleague, Mr. McCauley is now going to address the discretionary factors, Your Honor.

THE COURT: Thank you. Just a moment, Mr. McCauley.

(Whereupon at 9:47 a.m., a recess was taken in the hearing in this matter.)

(Whereupon at 10:12 a.m., the hearing in this matter reconvened and the following proceedings were had:)

THE COURT: Thank you for allowing me to take a break.

MR. McCAULEY: Absolutely, Your Honor. For the record, Thomas McCauley. Your Honor, the second part of the analyses, the burden of proof shifts to the parties opposing the motion to demonstrate that the Court should not exercise its discretion to appoint a committee. In our motion, we

cited the Dow Corning case. It's actually the Becker Industries case out of the Southern District at page 949 where the Court says, quote, "The burden shifts to the opponent of the motion to show that the cost of the additional committee sought significantly outweighs the concern for adequate representation and can't be alleviated in other ways." That's at page 949.

THE COURT: Uh-huh.

MR. McCAULEY: The discretionary factors that the parties have put forth effectively I would consider as, one, being the size and complexity of the case; two, being the cost of an additional committee; three, being the added complexity from another committee; forth being the timing of the motion; and fifth the other avenues or the lesser remedies that could be undertaken aside from appointing a committee. The Dow Corning decision, however, does emphasize that the discretionary factors are merely considerations and should not prevent the appointment of an additional committee if the appointment is justified on the facts. Now, no one disputes here the first factor, the size and complexity of these cases. So, that favors the appointment of an additional committee. The second point is the added cost, and certainly there would be some extra cost, Your Honor, but the question is whether the cost that would be added would significantly outweigh the concern for

adequate representation. We don't think that's the case here. To date the estate professionals have racked up significant fees in this case. Debtors' counsel through August has submitted fees in excess of 12.6 million. According to the July monthly operating report for American Home Mortgage Corp., which I understand is the primary debtor in this case, they've paid out 37.7 million in professionals fees in this case. So, also you have to look at where we are in this case. We're not at the beginning of the case. We're at the end of the case or in the plan stage. So, given that first of all we've got a Borrowers Committee with a relatively narrow focus, we're not looking to - the Committee is not looking to touch on all issues in the case, the Creditors Committee is for that purpose. The Borrowers Committee would be simply to focus on issues relative to the borrowers. Secondly, like I said, where this case is, the assets have mostly been liquidated. There's a plan on the table. It's just a question of addressing the notice and other problems that we've raised in our papers and getting this case to the finish line. In our reply papers, we've -

THE COURT: Your issues with the plan, at least as articulated, are fundamental; aren't they?

MR. McCAULEY: They are fundamental, but, Your Honor, this is a liquidating case; okay? I mean, it's not rocket science, I mean -

THE COURT: Well, my point is simply you're saying it's not expensive. You seem to imply it's not expensive because all you want to do is tweak the plan, but you want to go beyond tweaking the plan.

MR. McCAULEY: I'm not saying we're going to be tweaking the plan, but in consideration of what has gone on so far in this case versus what needs to be done to the plan, I don't view that as being a - we're not doubling the length of this case by any means. And in our papers we noted some suggestions that we had, you know, how a counsel for a Borrowers Committee could get to speed quickly without having to sort of incur a lot of costs. I mean, I will say that, in having to jump in, in this case at this point, we had to get up to speed somewhat already. Also, the debtors talk about the fact that there's a projected small distribution under the plan. Well, that doesn't equate to the idea that there's a small pool of assets available for general unsecured creditors. I mean, there's a projected distribution of pennies on the dollar but the reason for that is, the total universe of general unsecured claims is in terms of billions of dollars. I mean, the projection is that there will be a fairly substantial amount of assets available for general unsecured creditors, and a small amount of added costs to represent borrowers is not going to appreciably diminish that projected return. It's a little bit of math, but I -

THE COURT: I've got it.

MR. McCAULEY: Okay. The third factor is the added complexity in the case. A Borrowers Committee doesn't add complexity that is not already present in this case, and we think a Borrowers Committee would add value in a number of ways. First, the Committee can institute litigation that will bring value to the estates. First Alliance is a great illustration of that. Second, the Borrowers Committee can speak with one voice for borrowers. I think that's in terms of judicial efficiency, if nothing else, because instead of having different parties raise complaints either before or after confirmation, you have one voice speaking for borrowers. One voice can sit at the table with the debtors and the Committee to address the plan issue. There's an efficiency that's a Committee would be able to bring to bear. Third, in addressing plan negotiations and the structural deficiencies with noticing the plan, whether or not you grant this motion today isn't going to affect those problems. They're still there, and we think that appointing a committee allows borrowers to be properly represented so the issues can be addressed between the parties and if necessary put before the Court so everyone can address them in an informed manner. I mean, we have no interest in prolonging the process and if you look at borrowers, I mean, they're facing foreclosure. They want immediate relief. They don't want anything to drag

out either.

THE COURT: Well, is there anything a Borrowers Committee could reasonably do in the short term to prevent foreclosures?

MR. McCAULEY: You mean individual foreclosures?

THE COURT: Right.

MR. McCAULEY: You know it sort of depends on the particular situation given whether - I mean, I know in this case there have been a number of lenders who have loans that were sold by the debtors to other folks coming in seeking to lift the stay. There's that issue, but there's also issues of where the debtors actually still own the loans and BofA is servicing them or something else. So, I know I'm not answering your question, but I don't necessarily have an answer because it sort of depends on - I mean, obviously, a Borrowers Committee is not going to address specific borrower issues, just like a Creditors Committee doesn't address specific claims, but if there are general borrower interests that can be addressed by a committee that can facilitate whether it's general issues affecting borrowers and those who are potentially facing foreclosure, then that's something that a Borrowers Committee could do.

THE COURT: All right.

MR. McCAULEY: Your Honor, the fourth issue which obviously folks have made and specifically the debtors and

the Committee have emphasized is the timing of the motion here. The concerns that they raise and the cases that they cite just don't apply here. The Committee talks about that the motion was filed solely to frustrate confirmation. Well, that's not the case. The Committee's filed it to protect borrower interests and to prevent the plan from frustrating their interests. Now, they cited a couple of cases, the Cathar (phonetical) case, the Interco case. Those are distinguishable, those were reorganization cases. In those cases the interests were seeking the appointment of an additional committee to adequately represent themselves. As the U.S. Trustee has realistically set forth in its statement, that's not the case here. This timing issue, also, is colored by two concerns that no one has really given an answer for. One, is the lack of notice. There was no actual notice given to all borrowers in this case. The second concern is, what's the prejudice from filing the motion at this time? I mean, the cases talk about delay, but delay in a legal concept really means prejudice, and no one has articulated a material prejudice here that should cause the Court to not grant this motion. Now, the debtors talk about that they gave notice, they gave notice to actual borrowers who had actual or pending threatened litigation at the time or prior to the time that they served the bar date notice. They argue that all the other borrowers are unknown

creditors. Well, under the case law that's not what the courts look to. I mean, debtors - it's undisputed that the debtors had all the addresses and what they're saying is that, Well, we didn't know that these other borrowers might have claims. Well, the fact that they knew where they could find these creditors is what the cases look to. It's not whether the knew whether or not they had claims. Now, on top of that they should have known that there were other borrower claims out there. There's a number of borrowers who have appeared in this courtroom. There are borrowers who have asserted claims in lawsuits against the debtors during this case and outside the case. The debtors pushed unconventional mortgage products on unsophisticated borrowers. They've got to expect that they're going to get some claims whether they're claims based on the teaser rate interest or on the payment arm options, they should have known, and the fact that they published notice in the New York Times that's not exactly going to provide constructive notice to consumers in New York let alone all over the country, maybe in the New York Post. Now, I think the lack of notice affects the timing issue, but as well, it also affects how the debtors are not protecting the borrowers' interest in estate property. Now, the second point, as I said, was the lack of prejudice. I've emphasized this is a liquidating case and if a claim is not addressed by the plan, that borrower has no

remedy. So, in contrast to the incrementally increasing costs, there's no reason to exclude a constituency in this case, and if you weigh the balance of hardships it's not even close in this case. Finally, we don't think that there's any lesser remedy that exists in this case. Substantial contribution is not an option and an informal Borrowers Committee is not an option, and neither is adding one or two borrowers to the existing Committee. So for these reasons we think the discretionary factors actually support the appointment of a Borrowers Committee. They certainly don't outweigh the lack of adequate representation in this case, and for these reasons we ask that the Court direct the U.S. Trustee to appoint a Borrowers Committee in this case.

THE COURT: Thank you, Mr. McCauley. Is there anyone else who wishes to be heard in favor of the motion, either in person or on the telephone? All right, thank you. Mr. Brady.

MR. BRADY: Good morning again, Your Honor. Robert Brady for the record on behalf of the debtors. Let me begin with the legal standard and the burden here. I think it's well settled, everyone agrees, that § 1102(a)(2) places the question of the appointment of an additional committee within the sound discretion of this Court and the case law is clear. Appointment of an additional committee is an extraordinary remedy that courts are reluctant to grant. We cite to that

proposition in the Garden Ridge case, which cites Sharon Steel. Now, as a practical matter, Your Honor, I think it is fair to say that there is a presumption in this jurisdiction for the appointment of only one committee, and a party seeking the appointment of additional committees bears a very heavy burden.

THE COURT: Well, yes and no, and you can certainly have an argument to distinguish this from the asbestos cases, which are in many ways quite different, but it's routine to appoint an asbestos claimants individual and often sometimes a property damage committee in those types of cases.

MR. BRADY: And there is a key distinction there, Your Honor. In the Dow Corning case, the asbestos cases, in those cases -

THE COURT: They're mass tort cases.

MR. BRADY: - the product the debtor manufactured, there's really no dispute as to liability. The question went to damages. So, the parties assumed if there was damage, there was liability. Here there is no *per se* agreement that the product that the debtor sold was defective. The question is, were borrowers mislead or fraudulent induced to enter into mortgages they couldn't afford or didn't understand. And that is a case-by-case factual inquiry.

THE COURT: Well, that I understand and certainly that's probably the legal answer, but is that the practical

answer given the extra judicial non-evidence in front of the Court about what's going on in the real world in this country and in this economy, Countrywide, what was the settlement, 9.8 billion earlier this week. Certainly the political environment is less than positive, and I understand these weren't subprime loans, these were all-day loans but should the Court consider not necessarily the legal intricacies but perhaps the more practical intricacies involved?

MR. BRADY: Your Honor, there was no evidence to that. I mean, one point I want to make clear at the beginning is, the borrowers have put on no evidence, and the statements of counsel are really just that, and we've heard a number of things, there may be thousands of claimants or borrowers who are claimants, that the debtors systematically engaged in fraud and illegal conduct, speculation that word of the bankruptcy may have reached Wall Street but not Main Street. There's just no evidence before the Court, there's no record before the Court. There is the press, Your Honor, and reports in the press that right now mortgage companies are under fire. There's the subprime debacle that has led to - some speculate the current financial problems and economic problems, but there's no evidence in the record today that the debtors engaged in this systematic fraud and illegal conduct. Whether this a case-by-case, an isolated incident, or whether this was system wide in the debtors, and there's

been no evidence today. There's been no judgment by a court. There has been no fact presented to lead the Court to believe that this isn't a case-by-case, individual-by-individual -

THE COURT: Well, isn't a reply to that, taking the last point first, there's been no judgment because the automatic stay has been in place, and you've had very limited relief from the automatic stay in some isolated cases. Ms. Rush may be one of maybe four or five stay relief motions that have been entered to assert these types of claims as opposed to foreclosure stay relief, and second, doesn't that go to the adequacy of the ability for these people to represent themselves. In other words, isn't a committee necessary for the borrowers to be educated and represented in connection with prosecuting or asserting these potential rights and claims?

MR. BRADY: I don't think so, Your Honor, and I'll give you two examples where alleged creditors of the estate operate in a bankruptcy system without an official committee. The first is the securities claimants. Securities class actions are brought all the time. Counsel is retained to represent a class, and they participate in the bankruptcy, Mr. Etkin's here today to comment on the disclosure statement and the plan and to make sure that the plan in no way impacts their ability to pursue -

THE COURT: All right, but there's a distinction

there. First of all, there's a class. Second of all, there's a sophisticated attorney representing that class's interest. Here there is no class and there is no lawyer.

MR. BRADY: Exactly, Your Honor. The borrowers want all the benefits of a class without having established for the Court that there is a class, that this is system wide, that all borrowers suffered fraud or the majority of borrowers suffered from fraud and misleading conduct. They want all the benefits of the class action without having satisfied the ability to certify a class, and the borrowers do have sophisticated counsel today. I was very interested to hear how it came about from counsel's perspective and perhaps if we had evidence, we might have learned more when the borrowers first consulted with bankruptcy counsel, but I think by their own admission it was August even though this motion wasn't filed until -

THE COURT: Well, one of the implications or the representations to the Court is that this was a lawyer idea and not necessarily a client idea.

MR. BRADY: I agree, Your Honor, that was clearly the implication I took, and again, it sounds very much like the class action securities situation. The other example is the Warren Act, Your Honor. Employees who are terminated with little or no notice, obtain counsel as a group, and counsel for those Warren Act claimants participate in these

bankruptcies. They have an adversary in this bankruptcy. That counsel has no assurance of payment. That counsel has no estate funded payment. That counsel is pursuing the claims of a group of creditors, taking the risk that the counsel will get paid, and they are pursuing their individual claims against this estate based on alleged Warren Act violations. So those are two examples where groups of creditors who may not have independent financial resources to protect themselves are able to operate within the system without the appointment of an official committee. We think that the borrowers really want the benefits of guaranteed payment from the estate, paid by the other creditors of the estate, and the advantages of in effect a class action being certified without having established that there is a class.

THE COURT: Well, let's go back to a case you had R&I where we had a Creditors Committee and an Equity Committee. Now, there was no - I think there was, actually, a securities class in that case, but I may be mistaken. In either, it didn't really matter because the Equity Committee was formed partly because (a) equity was in all likelihood going to be in the money and (b) because they had disparate claims that needed to be represented, and that case really came down to the Creditors Committee and the Equity Committee arm wrestling for four or five months to finally reach a result where they could figure out how to deal with the

different payments to the different entities, and that was well within the Court's discretion. Now, I think it was Judge Walsh that appointed that committee. I wasn't onboard at that point, and I don't know if the debtor opposed it or not, frankly, I don't.

MR. BRADY: Your Honor, I was somewhat involved -

THE COURT: That was Mr. Nestor, yeah, right.

MR. BRADY: - but not involved, but I think Your Honor identified the key distinction. Equity was in the money and these were two groups, the Creditors Committee and Equity that had -

THE COURT: Disparate.

MR. BRADY: - disparate positions. Here if the borrowers are able to establish claims against this estate, they would be general unsecured claims. I don't think there's any dispute about that. Not entitled to priority, not administrative, they would be general unsecured claims. They have not been able to establish, either by evidence because there is none, or by argument that their general unsecured claims are any different than the general unsecured claims of other creditors in the case.

THE COURT: Now, but they are treated differently. Perhaps not in distribution, but in procedure in the plan.

MR. BRADY: Your Honor, again, there is a procedure for EPD breach claims, and that procedure is based really on

the historical records of the debtors of when typically the percentages of loans that were sent in portfolios would either be subject to such claims or, you know, either EPD claims or breach claims. Again, here, there is no concession on liability. Your Honor may recall that Katisha Cawthorn (phonetical) stay relief motion where the debtors' testimony was they had very little involvement in the origination in that loan. Basically they funded. A third party broker met with Ms. Cawthorn, sold the product to her. A third party settlement agent conducted the settlement, and when the debtors received verification from those two parties that all the documents were in order, it funded the loan. Now, Ms. Cawthorn contends that she was misled in connection with that loan. It's the debtors' position that they had virtually no involvement other than funding the loan.

THE COURT: But she also raised allegations basically, negligent supervision of your agent.

MR. BRADY: Absolutely, Your Honor, and those on a case-by-case basis are very factually specific. There has been no evidence that there was widespread fraud or illegal activity at American Home Mortgage in the origination of mortgages, that AHM sent brokers out to mislead the public. It's the implication of the borrower motion, but there's no evidence.

THE COURT: Understood.

MR. BRADY: So, Your Honor, as indicated by counsel, the first step is to determine whether the borrowers are adequately represented by the existing statutory committee. And again, assuming that a borrower can establish it has a claim against these estates, that bar would be an unsecured creditor and we submit aptly represented by the Official Committee. There's no allegation that this Committee is not operating or functioning properly. There's no evidence that they're not adequately protecting the interests of all unsecured creditors. Every subgroup of creditors, Your Honor, would much prefer to have its own official committee funded by the other creditors, argue for their own specific issues, but that is not how the system works. The Official Committee acts as a fiduciary generally for all unsecured creditors, not the Committee members. There's been much made about the makeup of this Committee yet there's no allegation that the Committee has in any way preferred the rights and issues of just their members.

THE COURT: Well, isn't that - I mean, the statute says - maybe I'm not right, but generally speaking, isn't - Yeah, here we go (b)(1), 1103(b)(1), "Committee of creditors appointed under subsection (a) of this section shall ordinarily consist of the persons willing to serve that hold the largest claims - the set of largest claims." Is it not surprising and perhaps - first of all, it's not surprising

that there are no borrowers on the Committee. Second, is this perhaps a structural problem in these kind of cases with how the statute is set up, which is perhaps why you see again in the asbestos and mastoid cases a distinction and a formation of official committees for those people or persons in those kind of cases.

MR. BRADY: Well, I think it's fair to say, Your Honor, the discretion for the appointment of the committees first lies with the U.S. Trustee's Office, and I think our Trustee's Office has a track record of looking beyond just the largest creditors and often attempting to include creditors from different groups. For instance -

THE COURT: I agree.

MR. BRADY: - landlords who may at the time of formation not have a claim but may be subject to future rejection are often given a seat on the Committee. Again, a very different position a landlord might have from other creditors. Other creditors may want to liquidate the estate and get the most money. A landlord may want to keep the estate alive and keep a tenant. That may be more important to them. Those are inter-creditor issues that exist in every case. The fact that the borrowers may want something slightly different than the other unsecured creditors does not create the situation where you have to appoint a separate committee.

THE COURT: Well, but again, I mean, generally speaking you have a case with a large bond claim out there, $600 million of bonds, $200 million of trade, maybe some landlords, and in my experience, back when I used to actually be actively involved in forming these committees or trying to get these committees formed and trying to represent the committee, you would often see, for instances, three bondholders, an indenture trustee, and three trade creditors, and the indenture trustee would be neutral on all votes that mattered, and the bonds and the creditors would hammer out a solution which was often difficult, the trade and the bonds, and really what moved the case along, but here there's nobody on this Committee to represent the borrowers. There's nobody to hammer this out on the Creditors Committee, and again, I'm not being critical of counsel but isn't there a fundamental difference in how this could - what issues were brought before the Committee for the Committee to hammer out and deal with in taking their positions?

MR. BRADY: Well, again, Your Honor, there's no -

THE COURT: Your response may be that the borrowers' claims are not material - or maybe not.

MR. BRADY: Well, there's no evidence that they are. In other words, the borrowers have not come forward and given the Court some idea of how much the claims may be in relation to the billions of dollars of claims. So, to that extent,

you're right, Your Honor, there is no evidence before the Court that the borrowers as a group would represent a statistically large group of creditors to warrant their own committee, but the borrowers chose not to put on any evidence on that point, but there's also no evidence that the borrowers have taken their issues to the Committee and were rejected or rebuffed by the Committee. There's no evidence that the borrowers have attempted to get the Committee to press issues for them, and the Committee has refused. That's simply not in the record.

THE COURT: Well, let me ask you, I mean, how many - Who's in charge at your firm of taking calls from borrowers? Who is the poor person that's been dealing with that?

MR. BRADY: It's been several different attorneys, Your Honor, based on either the hotline that was set up or calls that come in after pleadings are filed, but -

THE COURT: And how many calls have you taken? Hundreds? Thousands?

MR. BRADY: I think our papers say over 2,000 calls have been addressed.

THE COURT: And isn't that significant?

MR. BRADY: Well, I'm not saying all those calls are from borrowers. I mean, we receive calls from all constituencies in the case. Shareholders asking about their stock. Borrowers asking about their mortgages, and not all

of the borrower calls we receive assert they have a claim. They want to understand who's servicing their mortgage? Is there going to be any interruption in service? How do they get a payoff on their mortgage amounts so they can refinance? The calls run the spectrum.

THE COURT: And the letter that was on the website I assume was a servicing oriented letter.

MR. BRADY: Absolutely, Your Honor. In fact the second sentence which counsel did not put into the record specifically addresses that the servicing of their mortgage should be uninterrupted based on the filing. It was an effort.

THE COURT: We've had numerous hearings on that.

MR. BRADY: Yes.

THE COURT: And again, there's no evidence that there has been any effect on servicing.

MR. BRADY: Correct, Your Honor, in fact the evidence throughout the case was to the contrary, but servicing operated without a blip during the bankruptcy. The loans were being serviced in accordance with the guidelines, and there have been a few complaints, but again, we had 1.5 million loan files either originated by or serviced by the debtors. I would think that out of 1.5 million loan files the fact that there are 450 claims that appear to be borrower related claims, and again, they run the spectrum, they're not

all asserting fraud or illegal activity, is a pretty good track record based on the debtors' performance I would think pre-petition, out of 1.5 million if only 450 filed.

THE COURT: I do seem to remember we had some blips in August and September on servicing, but I haven't heard anything since, and I mean '07.

MR. BRADY: I believe that's right, Your Honor, there were some blips in frozen accounts where certain tax payments didn't get made out of escrows, and we did correct that as quickly as possible of course. Since we're on it, Your Honor, I would like to take a moment to address the noticing of the borrowers because the implication clearly from the borrowers is that was some conscious effort on the part of the debtors or the Committee to disenfranchise borrowers by not serving the 1.5 million borrowers under the loan files in the debtors' system. Movants acknowledge, as they must, that not all borrowers are claimants. Not all borrowers believe they are creditors of this estate. Again, we had 1.5 million loan files and I think the record is clear from prior hearings the cost to serve them with a bar date notice was in excess of $2 million. But the real issue is, Your Honor, the debtors had no reason to believe all of their borrowers would assert claims against the estate. As set forth in our papers, the debtors consulted with their in-house legal counsel and if someone had filed a claim, if

someone had threatened a claim, if someone had threatened litigation, they received notice. Those were known creditors, potential creditors to the estate. But just because a borrower's address is known to the debtors or reasonably ascertainable, does not make them known for purposes of requiring that they receive notice. The case closest that we found on point is a case called Heavil vs. NBR (phonetical). It's a 1997 case out of the Northern District of Illinois. In that case, Your Honor, NBR had filed for bankruptcy and emerged as a reorganized entity. Subsequent to their reorganization a group of borrowers brought a class action based on alleged unlawful escrow activity. NBR sought to dismiss that class action saying that those claims arose prior to the filing of their bankruptcy and therefore had been discharged. The plaintiffs argued they never received notice of the bankruptcy and therefore those claims were not discharged. The District Court found that the fact that the identities of the homeowners mortgagors may have been reasonably ascertainable from the loan files was not sufficient to make them known creditors. In that case the Court found that NBR, the debtor, could not have anticipated that the mortgagors would bring a claim and therefore were not known creditors requiring notice. Again, the debtors believe that they did an appropriate job of trying to ascertain from the 1.5

million loan files they have, the universe of potential creditors, served them with actual notice and published the notice of the bar date, I believe, in three newspapers, not just the New York Times, but three newspapers. Your Honor, the fact that the borrowers have issues with our plan and disclosure statement is not remarkable. That is how the process works. Creditors come forward and raise issues with a plan and disclosure statement, and those creditors aren't entitled to the extraordinary relief of their own committee. The debtors take very seriously all of the borrowers' concerns that were raised in these pleadings. In effect, the motion and the reply filed by the movants formed the basis of a very comprehensive objection to the disclosure statement and to the plan, and in fact, Ms. Rush did adopt that as her objection to the disclosure statement, and we have made changes, and you'll hear more about them if we get to the disclosure statement to address those just like we made changes to the plan to address the issues raised by a variety of creditor constituencies including the securities class action plaintiffs. Now, I'm happy to walk the Court through how we addressed those but suffice it to say, Your Honor, much of what counsel said is in the plan that he believes impacts borrower claims against third parties or attempts to require borrowers to come to Delaware to litigate all issues, we have addressed. That is not the goal of this plan. The

goal of this plan is not to in any way impact the borrowers' rights to assert what they believe are direct claims against third parties.

THE COURT: So your point also may be that in effect the point a Borrowers Committee has already been achieved.

MR. BRADY: In many respects, Your Honor. They raise really two borrower interests they want to protect. The one was to keep people in their homes, and as Your Honor indicated, what effectively could a Borrowers Committee do to prevent individual foreclosure actions. But as we indicated and the Committee indicated, we sold the servicing business. AHM is no longer servicing loans except for a small subset of construction loans, and we have sold or transferred control of the vast majority of the portfolio. The loans are now owned by third parties and now serviced by a third party. So the ability of a Borrowers Committee to in any way have an impact now on keeping mortgagors in their homes, that has passed. Those actions lie with the servicer and the owners of those loans.

THE COURT: And yet - I don't want to get too much into the plan and disclosure statement, but and yet those parties, at least the owners, are recipients or beneficiaries of the injunction under the plan.

MR. BRADY: The owners of -

THE COURT: The current owners of mortgages the

debtors have sold. That was my understanding from counsel's argument.

MR. BRADY: Let me confirm that, Your Honor, but I don't believe that's the case.

THE COURT: All right. Well, again, I don't want to get too much into the plan, but -

MR. BRADY: Again, all of the orders transferring loans in this case have been -

THE COURT: 363.

MR. BRADY: 363(o), and we have added to the plan and the disclosure statement a post-confirmation 363(o) for protection. In other words, any loans transferred out of the trust -

THE COURT: Will have the same protection.

MR. BRADY: - will have the same protections as 363(o) provides. So, again, we have attempted to address that.

THE COURT: Okay.

MR. BRADY: Your Honor, I think a key element I want to come back to is really this - the argument comes down to why they need a separate committee because they've acknowledged they're unsecured creditors and we have an Unsecured Creditors Committee, are really inter-creditor disputes. They argue that because borrowers may want to pay less interest and lower fees on their mortgage -

THE COURT: Uh-huh.

MR. BRADY: - other creditors may want the borrowers to pay contractual fees and contractual interest. Those inter-creditor disputes exist in every case. If one creditor's claim is disallowed in the case, it benefits the other creditors because there are fewer claims to cover the funds available. We see it with preference actions. Certain creditors may have received a payment in the 90 days. They don't want to give that back. The other creditors who didn't receive payments in the 90 days would like those funds to come back and to share in those. Those are not the basis that form a separate committee. That's a dynamic that exists in all Chapter 11 cases. That is why the Creditors Committee must look out and have a fiduciary duty for all creditors and leave the individual creditors to pursue their own goals and interests in the case, and I submit the borrowers have done that. The borrowers have participated in this proceeding. I'll get to timing in a moment, Your Honor, but there's been no answer to the timing question. The borrowers have participated. The borrowers eventually did consult with sophisticated bankruptcy counsel. It sounds like that may have come about by the sophisticated bankruptcy counsel reaching out to the borrowers, but there's been no reason given why that we were 13 months into the case when this was filed, that now we're 14 months into the case and the fact

that this was filed has already caused a delay of the disclosure statement hearing. And, Your Honor, time is money. There is a burn rate in this case. There is a liquidity issue in this case and that the estate has assets that will take some time to liquidate and to turn into cash. So there is a very real harm caused to the estate, a very real prejudice caused to the other creditors of the estate, but at this late time in the case, the borrowers have emerged, through counsel, and want to renegotiate the plan. I think Your Honor knew my argument coming up, and that is that the system is working. The borrowers have put forth a very comprehensive objection. The debtors in consultation with the Committee are taking steps to address those where we can. There are things that the borrowers want that we can address, but that's not unusual.

THE COURT: Well, let me address, I guess the delay is really a cost issue when it comes right down to it because - a little bit of a liquidity issue, of course, as well - or maybe not a little bit, but a liquidity issue and a cost issue, and on the cost side and also on the liquidity side, I mean, the Court has the discretion to fashion a remedy. So, for example, in Federal Mogul, when Judge -

MR. BRADY: Fitzgerald?

THE COURT: No, before that. Lyons, Judge Lyons formed the Property Damages Committee, I believe, he limited

their fees to 250,000, some amount, and limited their time to do what they wanted to do. Now, I could fashion a remedy where I appointed a committee of borrowers, limited their compensation, and gave them a hard deadline to do what they need to do. I could continue the disclosure - and I'm just - I'm not saying I'm going to do this, I'm exploring the options with you. I could delay the disclosure statement for 45 days, give them $400,000 and say, Do what you can do, and if you want to further delay, you'd better come in here with cause, and that would limit - it wouldn't eliminate, but it would limit the prejudice to the estate.

MR. BRADY: Potentially, Your Honor, but it would be significant prejudice, and the prejudice is to the other unsecured creditors. That's additional money out of the estate that would otherwise go to creditors. The burn rate increases for all the professionals. It delays the ability to start making distributions on people's claims, but Your Honor, we should focus on the practical reality, it's not going to be that easy to flip a switch and say, Now we have a Borrowers Committee. Who does the U.S. Trustee notice for a Borrowers Committee? All 1.5 million borrowers? The 450 who filed claims? The movants and those who joined? What's the universe of borrowers that the United States Trustee would canvass? And then the U.S. Trustee must make the decision of what - because they have very different claims, different

allegations. Some borrowers believe their servicing wasn't properly performed and that caused them a credit problem. Other borrowers claim there was fraud or illegal activity. The U.S. Trustee now must determine, What's the universe of this borrower group and how do I insure that they're adequately represented by a Borrowers Committee? The fact is, the borrower claims are very different. Counsel tries very hard to make Your Honor believe that the borrowers would speak with one voice and one set of issues and all have a common goal, but I would submit, Your Honor, the borrowers have very different issues. Those who believe the servicing wasn't properly performed, they want their money.

THE COURT: Well, that's an issue of difficulty intra-committee that you touched on earlier that most Creditor Committees have, and we touched on earlier. There's often tensions in the committee. So, that's really an argument that it would be difficult to run the committee or maybe difficult to form the committee but not necessarily whether the appointment of a committee would be appropriate because of lack of adequate representation.

MR. BRADY: Well, it really goes to delay too.

THE COURT: All right.

MR. BRADY: I'm simply pointing out to Your Honor -

THE COURT: The complexity.

MR. BRADY: The complexity and the delay of actually

getting a committee appointed and then having them choose professionals. You have to tack that on to what Your Honor was suggesting, providing them 45 days to get up to speed and to deal with their issues. You have to tack on that process of actually forming the committee, which could be substantial if the U.S. Trustee has to go through all of those issues as to how to get notice out, who gets notice, and what's the universe of the borrower.

THE COURT: Well, again, the Court could fashion a remedy on notice and approve newspaper or publication notice for formation of the committee in nationally-wide publications like USA Today or - as an example.

MR. BRADY: Right.

THE COURT: And authorize the U.S. Trustee to form the committee based on written submissions as opposed to holding an actual meeting, which is quite common in other jurisdictions. I think in the Southern District of New York that's how all committees are formed.

MR. BRADY: It's true, Your Honor could fashion all of those remedies. Again, there's been no evidence that there is a class, if you will, of borrowers with a common interest and common set of claims, that the borrower claims are individual claims and very fact specific. Once they've established they have those claims, they're unsecured creditors of this estate and should receive a distribution

under the plan like any other unsecured creditor, but at this point the borrowers have not done that. They have not established that they have allowed general unsecured claims, and that's where the equitable subordination issue rings hollow, I think, Your Honor. 510(c) speaks in terms of an allowed claimant seeking to subordinate another allowed claimant's claim. No one has allowed claims yet in this because the time to object still exists and the debtors are continuing to conduct their claims administration.

THE COURT: Well, once the claim is filed it's deemed allowed.

MR. BRADY: It's deemed allowed subject to an objection period, and certainly claims that are subject to litigation that are the subject of state court litigation here where the stay's been lifted and is ongoing are certainly disputed by the debtors, and the debtors could put their objection on file quite quickly to confirm that. It's trying not to add additional costs to the borrowers. In other words, if those borrowers come back with a judgment from the state court and amend their claim to include that judgment, the debtors are not likely to further object to that claim unless they assert a priority that's not appropriate. So that process will play itself out. Counsel makes much of the fact that the plan doesn't address how will borrowers' claims get liquidated? They'll get liquidated like every other general

unsecured claim. Either they'll seek relief from stay to liquidate their claim in a court of competent jurisdiction or their claim will be addressed through the bankruptcy process. It will either be objected or not, and it will become an allowed claim if appropriate. But that's the same for all creditors.

THE COURT: Right, but isn't their response, that's exactly the kind of thing that calls for a committee because common sense tells us that's not fair or - fair is the wrong word. That's not really giving those claimants due process based on their individual situations, based upon their probable lack of ability in many cases to hire counsel to bring these kind of claims, certainly, the inherent difficulties with any *pro se* plaintiff in prosecuting claims, and wouldn't a committee be appropriate to deal with whether that is the correct procedure or whether some other procedure for liquidating borrower claims would more appropriately deal with the inherent due process problems with requiring *pro se* plaintiffs to prosecute stay relief motions and litigation either here or in any other appropriate jurisdiction?

MR. BRADY: Well, first, nothing requires that borrowers act *pro se*. For whatever reason the borrowers, if they're unable to obtain counsel, it's because they're pursuing claims against a bankrupt entity. That often does dissuade counsel from wanting to become involved, but again,

Your Honor, since this is an extreme remedy you must consider other options to allow the borrowers to have a voice, and that is, why should the borrowers not just take their movants and create an Ad Hoc Committee. The reason is, they want a guarantee of payment. They want to be guaranteed that counsel will get paid, but the Warren Act claimants, their counsel doesn't have a guarantee of payment. The securities class action lawyers don't have a guarantee of payment, but they're operating within the bankruptcy as a group and without an official committee. Why should the borrowers have a different treatment? Why shouldn't this group form an Ad Hoc Committee, press their issues, and seek a 503(b) -

THE COURT: Well, let's be realistic. When we have an Ad Hoc Committee of noteholders in a case, like a second tier or a second tranche secured noteholders that's at least partially out of the money, their counsel's getting paid, I mean, usually by the agent, and the agent's getting paid by the noteholders. So, they don't face the same kind of risk and that's the most common Ad Hoc Committees I see.

MR. BRADY: Well I would submit in today's environment, there are a lot of second lien committees the debtor formed on an ad hoc basis where there is no assurance that the second liens will receive a distribution under the plan.

THE COURT: Well, what about the lawyers?

MR. BRADY: Well, again, the lawyers would be paid by the agent, but the agent would pay them through funds received as a distribution to the noteholders. I don't think the agent has an independent obligation to go out and incur expenses of counsel that it can't recover on.

THE COURT: Have you ever not been paid for an Ad Hoc Committee of second lien lenders, or did you have really good retainer letters?

MR. BRADY: I'm trying to think, Your Honor. I certainly know that my fees have been cut, but I do believe I've always received at least some payment. But again, Your Honor, the process is working here. The borrowers have participated in this case. The borrowers are here today. If I understood counsel correctly, because I think their paper said they don't represent the movants individually on the disclosure, but I think counsel indicated that his firm was representing Ms. Rush today, and she has fully adopted the borrowers' motion and their reply as her objection to the disclosure statement. So that, we think we've addressed as much as we can. The Committee will be heard on that as well. There's the United States Trustee, and ultimately Your Honor will make the decision whether the disclosure statement is appropriate and whether the plan should be confirmed, and whether it provides appropriate safeguards for the borrower issues, but they're before the Court and they will be heard by

Your Honor, and Your Honor will get to ultimately make the decision as to whether the borrower objections and comments should be included in the plan. So the system is working. The question is, are the borrowers entitled to halt the proceedings, form the extraordinary remedy of creating a second official creditors committee of borrowers when there's been no evidence that the existing Committee is not capable of addressing their rights as general unsecured creditors and incur that additional cost, that additional delay to the detriment of all other creditors in the case or should the borrowers proceed like the other creditors have, which is raise issues with the plan and disclosure statement, either attempt to resolve them or have the Court rule and we move forward on confirmation of the plan. Now, Your Honor, I've had a long presentation here. I think I've covered almost everything during our process, and I won't start at the beginning and walk through it all, so - But, if I may, Your Honor, I may let Mr. Indelicato speak and if there's anything I missed out of the presentation I wanted to bring to Your Honor's attention maybe I could have a few moments after he's completed.

THE COURT: Sure, we can definitely do that. Let's take a short recess though before Mr. Indelicato's argument. So, we'll try to reconvene at 15 minutes after the hour. All right?

(Whereupon at 11:06 a.m., a recess was taken in the hearing in this matter.)

(Whereupon at 11:20 a.m., the hearing in this matter reconvened and the following proceedings were had:)

THE CLERK: All rise.

THE COURT: Please be seated. Mr. Indelicato, good morning.

MR. INDELICATO: Good morning, Your Honor. Mark Indelicato from Hahn & Hessen on behalf of the Committee. Your Honor, I will try and make this brief because I think Mr. Brady has addressed many of the issues that the Committee has, but I think let me start first by assuring the Court and the borrowers that the interest of the Unsecured Creditors Committee is nothing more than maximizing creditors, all unsecured creditors, and that includes the mega banks, that includes the borrowers who have unsecured claims against the estates. This Committee was appointed by the U.S. Trustee's Office, and as I've said in other cases, I think they did get it right in here. I do agree there is no borrower on the Committee but there are two indenture trustees. There are three parties involved in the purchase of securitization of the loans, and there were two trade creditors, and now we're down to one trade creditor because their issue was resolved, and I would point out, Your Honor, when people question the integrity of this Committee they should be mindful, this is a

Committee that's supporting a plan in which there may likely be no distribution to the two indenture trustees because of inherent subordination provisions. So, if people believe that this Committee is not exercising their fiduciary duties, I want to set that record straight. Your Honor, I think what we need to focus on and my comments from last November have come back to haunt me yet again when we dealt with that relief stay motion that the Committee opposed, and the Committee opposed it for various reasons that we discussed at that hearing and my comments, while I won't necessarily say being taken out of context, indicated that the Committee was not interested in or mindful of the plight of the individual borrowers, and I could not foresee what was to happen over the next eight to ten months, but now, Your Honor, we are representing the liquidating trustee in the New Century case, and we are in essence stepping into the debtors' role trying to deal with the many issues raised by borrowers and in foreclosure actions, and to say we've been somewhat humbled by what is going out there, not only as it's affecting the broader market, by how it's affecting the individuals, we do understand the issues, and we understand the issues to be several-fold. First, Your Honor, to the extent the borrowers have claims against American Home, unfortunately for the borrowers, given the posture of this case where all of the loans have been sold and/or otherwise dealt with particular in

the BofA settlement, the debtor is not in a position to either agree or negotiate recessions, modifications, or amendments to those loan documentation, and that is their primary relief their seeking. To the extent they might otherwise be entitled to that relief, Your Honor, they will have claims against this estate and that will be an unsecured claim and it will share *pari passu* with all other unsecured claims. This plan and nothing in this plan eliminates their rights to assert claims against third parties. If there is an entity that purchased a loan from the debtor and that loan has infirmities, the borrower may have the rights to sue those third parties and/or defend in any foreclosure actions. So, Your Honor, the relief they're seeking, unfortunately, is not available through a committee or any other means in this bankruptcy proceeding. I understand the Court's concern that the borrowers are not being addressed individually as a group as the EPD claimants may be, for example. Your Honor, with respect to the EPD and breached protocol, the borrowers are looking at that as a blessing to the EPD and breached claimants as an easy streamlined process to resolve their claims. I will tell you, and I think you may have noticed in the objections to the disclosure statements, I don't believe the EPD and breach claimants believe it's a blessing at all. They believe we're artificially deflating their claims, limiting their claims, and not giving them their proper due. So, Your Honor, it's

the old proverbial, the grass is always greener on the other side. We will deal with the claims of the borrowers in an appropriate manner. Whoever ultimately is appointed as the liquidating trustee will review them on an individual basis, deal with the merits of the claim, and to the extent it's appropriate, will object to the claim and if not the claim will be allowed. But I think the liquidating trustee will have to deal with them on an individual basis. There's no methodology, at least that I've been able to come up with, whether there was a Borrowers Committee in place or not, where you could waive a magic wand and say all of the borrower issues would be dealt with in one way, shape, or form. There are, as Mr. Brady said, potentially 1.5 million borrowers out there and some of them may have claims and some of them may not. The borrowers will be protecting both those who got the benefit of their bargain and those that did not. There's an inherent conflict and the Court pointed out that that could be an intra-committee issue among various creditors, but I think it goes more, Your Honor, to point out that each individual borrower's claims are individual to themselves. Whether they were defrauded or not, whether they had issues with the title company that didn't release a escrow, whether they've never gotten the information they wanted regarding whether their real estate taxes were paid or not, whether the service had failed to pay their real estate taxes and the result of that,

there was a tax foreclosure, whether there were issues with respect to the agents or whether there were issues with respect to all of that. Those are going to be individual claims, Your Honor, that each - unfortunately, each borrower is going to have to address itself. I'm not sure even appointing a Borrowers Committee is going to address those issues. Your Honor, there are issues about equitable subordination and whether or not the liquidating trustee would properly investigate those. I can assure this Court, as we've done in other cases, to the extent this Committee has any say in the documents that are being proposed, and we do, that the liquidating trustee and who the liquidating trustee will be, that liquidating trustee will be charged with investigating all claims, and I can assure the Court that I believe he will to the extent he or she will. To the extent there are appropriate claims against financial institutions that will bring benefits to the estate, those will be pursued. If the borrowers believe they have a right to equitably subordinate an individual lender or other party who dealt with the debtor, I'm not even exactly sure in the context of the bankruptcy how it would be dealt with. Really, what they'll be looking for is to get benefits for themselves or their individual mortgages, and in and of itself, it doesn't seem to be a result that is conducive to the bankruptcy process. Your Honor, I don't want to belabor the timing issue, and for

whatever reason it was, they did make the motion thirteen months after the case filed, but I think the Court needs to focus on - and as they said, Where we are today. And where we are today, Your Honor, is on the precipice of presenting a disclosure statement to this Court and hopefully getting a plan confirmed. I do not want to minimize the liquidity issues that this debtor is facing. On a conference call of the Committee in order to break what was otherwise a tense call, I made a comment that, Let's see which one of you is left after this call it over. Believe me nobody laughed at the end of the call, but what it points out, Your Honor, is these assets are very volatile, and the quicker we can reorganize and begin the process of getting a liquidating trustee in there, the better off we're going to be. The opportunities to sell the buildings that existed a year ago, don't exist today. The opportunities to sell the mortgages that were a year ago, don't exist today. We have a bank that we thought was golden, and who knows what its value is in today's market. So, Your Honor, it is important that this process start and conclude. Even 45 days could have a significant impact on the ultimate result of the recoveries in this estate. Your Honor, I think I just want to close by again adopting many of the comments made by Mr. Brady, by assuring this Court and the borrowers that this Committee really is truly out there looking at the interests of all

creditors whether they be the borrowers or the big investment bankers, and that we are doing everything to maximize the recovery to creditors. Unfortunately, these borrowers have only unsecured claims against the estate which are being represented by my group. To the extent they have other claims, those claims are against third parties, and if their objection did anything and helped clarify in the plan that those claims are not being waived, then sobeit, but I think Your Honor, that is the best they were able to get out of this. They have their rights against third parties, and their rights as unsecured creditors are being protected by this Committee. Thank you.

THE COURT: Mr. McMahon?

MR. McMAHON: Your Honor, good morning. Joseph McMahon for the United States Trustee. I think we come before the Court today, Your Honor, in a position to what an *amicus* would do basically. We're not, to be clear, I know you're hearing from two parties who oppose the relief requested. We are not in such a position. I think we are coming before this Court as a friend in a neutral position. We wanted to hear what the borrowers had to say and what the opposing parties had to say here today before speaking. I think our statement in light of the argument that we heard today, I think really cuts to the core of the way we see the issue which is, you have the adequate representation argument, and Your Honor

heard the competing arguments on the adequate representation issue, and the competing arguments that the Court heard with respect to that. With respect to the formation of the Committee, Your Honor, Your Honor is well aware of the logistics, meaning that we are given a list, a list of the top twenty or top thirty, normally, that's attached to a petition. Your Honor is correct. I can assure Your Honor that there were no borrowers on that list at the time that we solicited for the formation of an official committee. To the extent that a borrower heard of the bankruptcy case and asked for a questionnaire, we certainly would have sent it, but my recollection is that I don't believe any borrowers stepped forward for consideration for the Committee. But, with respect to that issue, Your Honor, I think that the record, I guess, outlines competing arguments with respect to adequate representation, and I think that that issue can probably be addressed without casting aspersions on the work that the Committee has done to date. We don't - based upon the record, I don't think there's any factual basis for concluding that the official Committee has not been diligently representing the interests of general unsecured creditors as a general matter. But, that being said, Your Honor, I think the point the borrowers are essentially making is that there's this class of plan and disclosure statement related issues that we - Well, first, we're not on the Committee, and second, that

are distinct to our interests, our constituency, and we need to be heard on those and absent the official committee vehicle, we're just not going to get there. That's really the point at which I think we're at in this hearing, and a few - a couple of other things, Your Honor. We do agree that there has to be a recognition of, to the extent that the Court were to appoint a committee, what the purpose of it would be. We appreciate the fact that the borrowers have their own distinct individual claims and that obviously the official committee vehicle would not be used as a purpose for, say, prosecuting their own personal property interests or addressing those interests viz-a-viz the estate. I think the critical point that the borrowers are making with respect to the purpose of the committee and the one we think is worthy of this Court's consideration is, the issues relating to the plan and disclosure statement. Your Honor, in colloquy with Mr. Brady, I think, touched on some points that are noteworthy. First, with respect to fashioning a remedy, we absolutely agree that the Court under Federal Mogul a Third Circuit decision has the ability to condition payment of professional fees and the like to the extent that you were to go in that direction. With respect to notice, Your Honor, Mr. Brady raised the issue of, Well, how are we going to get from point A to point B when we have a potential pull of 1.5 million people, and logistically, I'd just like to speak to that point. I know it's a secondary

issue and we talk about it later, more, but in every Chapter 11 case you get a list of 20 or 30 entities that are presumably the largest claims. We have a case here where regardless of the dispute about notice, the claims bar date has passed. Presumably, it would not be difficult to get a list of asserted homeowner claims from the debtors, the claims agent, whoever, and I guess address notice with respect to a committee in that direction. I could also speak with borrowers' counsel to the extent that, again, we get to that point, but I don't think that, and obviously I would defer to the Court on this, but there's a way of getting or addressing that point short of publication notice in the short term. I don't know if the Court has any questions for me, but I think -

THE COURT: Well, assuming arguendo, and again, it's an assumption, that the Court were to direct the appointment of a Borrowers Committee, we cut through the notice issues, what kind of time frame do you think you could act under, reasonably.

MR. McMAHON: Well, assuming that the Court agreed with our view regarding notice, I get the list within a day or two, I think that we could probably address that issue within 10 days, 10 to 14 days would be - 14 days being the outlier.

THE COURT: Okay. That's all, thank you.

MR. McMAHON: Thank you, Your Honor.

THE COURT: Hang on before you speak. Is there anyone else who wishes to speak in connection with the motion? Okay, I'll hear a reply.

MR. WEISBROD: Thank you, Your Honor. Stephen Weisbrod for the borrowers. Debtors' counsel emphasized several times that in his view there was no evidence, his word, of material claims on the part of the borrowers. The Court can take judicial notice and the debtors have admitted that there are at least 450, approximately, claims by owners. Those claims are, obviously, material at least to the borrowers if not to the debtor. Many times they're seeking recision of mortgages that can make the difference between keeping their homes or not, and I'm going to get to below the question of whether recision is really at issue here. They have setoff claims. The damages may be low in these cases, they may settle for next to nothing compared to a big securities case, but $10,000 or $20,000 is a lot of money to somebody who is three months behind on his or her mortgage payment. These claims are very material to the people who are seeking the appointment of a committee. Now, the debtors' counsel also stated that in his understanding in the other cases involving lots of tort claims, and I don't want to get into a debate about whether 450 is mass tort or just many torts, but in lots of cases he says, If there's an acknowledgment, there's liability. Actually, in Burns & Row

(phonetical), which is pending, I represent the asbestos claimants as insurance counsel there, there's never been a verdict against Burns & Roe. Federal Mogul, Armstrong, et cetera, they always argue that they should not be liable, and in most of these cases, there's no allegation that every product that the debtor sold contained asbestos or that every person who bought the product injured somebody. In all of these cases, same with the hospital cases, where some patients assert malpractice claims, most don't, you're dealing with a subset of people who claim that the debtor's liable for some wrongful conduct. Now, that's the case here, whether or not there's actually been a verdict. It's true that there's no uniformity among the plaintiffs, but you don't need that in order to form a committee. Now, it's also been observed that there's no class. I think Your Honor is correct that you don't need a class under Federal Rule of Civile Procedure 23 in order to find that people have sufficiently similar interests in order to have a committee formed. In fact, in most tort cases, there is not a class. There are a lot of individual claims. Sometimes people lose sight of that because, say, in asbestos you can have one lawyer representing thousands of claimants. That's not the case here, but they still have similar interests. Now, we - and I want to repeat this, we do not impugn the integrity of committee members or the committee law firms, and we are not saying that they have

breached their fiduciary duties. We're not taking a position at all on how well they've done their job. We're not going to try to go back and look at everything they've done in their efforts to generally maximize the value of the estate. We have no reason to doubt it. Our point is simply that in terms of protecting the interests of borrowers, the interest of borrowers in estate assets, and the interest of borrowers on how the estate is administrated, they're not getting the job done. These borrowers may all be of the same priority as other unsecured creditors, but they can't be treated exactly the same way and that's why a different committee is needed here. Now, I've heard a few times that we, according to debtors' counsel and committee counsel, there really are only two issues, and I'm never quite sure what those two issues are supposed to be, but let me make this absolutely clear. On the plan alone we asserted eight different problems, and only one of those has been addressed properly. One of them has been addressed improperly, and I want to answer the Court's question about the injunction. The parties protected under the plan injunction, as we understood it, were a narrow group: the debtors, the plan trustee, the POC, the trust. But, if a mortgage is still held by one of those - sorry, if the mortgage is not still held by one of those, if the mortgage has been sold and some other servicer is seeking to foreclose, a borrower is precluded under the current version of the plan

from suing the trust or any of the other protected parties. So, if Citibank, say, held the loan and Citibank was servicing the loan and tried to foreclose, a borrower, it is correct, Mr. Brady is right, could still bring Citibank into Court. What the borrower couldn't do is bring the trust into Court. That's what I was intending to convey to Your Honor this morning. Now, we have repeatedly pointed out that it is almost impossible for a borrower to know how his or her claim would be treated. Mr. Brady said up here that a borrower upon getting relief from stay, which would be generally deemed to have occurred, could sue in a court of competent jurisdiction. That's not what the plan actually says. It says that the claim has to be brought in the Bankruptcy Court. The claim would be allowed under an order by Your Honor or another bankruptcy judge. Maybe that is what Mr. Brady intended, that anybody could sue in any court of competent jurisdiction, but the plan doesn't say that right now. I want to emphasize why this matters and why recision really is an issue and the other non-monetary relief really is an issue. Number one, the debtor still owns many mortgages. So as to those, it's clearly an issue. As to the mortgages that have been sold, and most have, under TILA, and we write this in every brief and opposing counsels ignore it, a finding of some TILA violations against the originator is binding on the successor owners. So, it matters. A borrower actually can get recision

that applies to the successor owners by defeating the trust in court on TILA issues. It matters, and the fact that the plan, even after our motion continues to allow the trustee to destroy any documents, that means in its discretion, makes this doubly problematic because the evidence that a borrower would try to marshal in such a case could well disappear. On the notice issue, Your Honor, we've got a false dichotomy going on in this Court between all borrowers on the one hand and the narrow set of borrowers who said at the time the petition was filed that they wanted to sue. The debtor could have given notice to all borrowers who were subject to foreclosure proceedings; it didn't. The debtor could have given notice to all borrowers who got teaser rates; and they didn't. The debtors could have given notice to all borrowers who had payment option arms; and they didn't. Now, there's no dispute that the debtor sold these types of products which often result in tort claims. There's no dispute about that. They definitely and they have admitted this, sold payment option arm products and products with teaser rates, and the Court can take judicial notice of that, having presiding over these cases. Your Honor made a comment which is actually accurate that the motion - I don't mean to suggest that others weren't, but I just want to make clear that we're not hiding the fact that the idea of appointing a Borrowers Committee is a lawyer idea, and in fact, I mentioned it in a casual

conversation with somebody at a public interest organization. I don't think Tilton Jack or Paula Rush or any of the other dozen borrowers should be faulted with not being familiar with § 1102. When you're dealing in particular with consumer advocacy issues, it's usually public interest organizations or law firms acting *pro bono* that take the lead on these things, that try to come up with a strategy because we're not dealing with sophisticated people who can do it themselves. And so, we're not embarrassed at all about the fact that actually Zuckerman Spaeder and we each independently have been talking to consumer organizations, and we know each other anyway, and at that point the consumer organizations ran with it. So we never actually solicited any borrowers. They came to us through legal aid offices, but that's how it happened. There's nothing to hide about that. That's a good thing. That's what separates this case from, say, New Century where there aren't 363(o) provisions, no one asked for a Borrowers Committee.

THE COURT: That's nothing different is it than the cattle call show we have at every Creditors Committee formation meeting when you've got 40 groups of lawyers in there in effect soliciting business from a newly created entity that isn't required to hire an attorney.

MR. WEISBROD: There is some similarity and I think that, you know, I work for a for-profit law firm so I don't

disparage people who go out and try to generate business, and in fact we would be seeking payment if we were appointed as counsel for a Borrowers Committee here, but I do want to stress that when you're dealing with public interest organizations, the impetus for this is even more important. Lawyers have to be creative and proactive in this regard because the people they protect won't do it themselves.

THE COURT: Right.

MR. WEISBROD: And, Your Honor, I want to talk about the limited role that the Borrowers Committee would have in our view if we went forward with a Borrowers Committee. The Borrowers Committee would not be seeking to do all the things that you normally have a committee look into, preference actions, that sort of thing, but there are some issues on which borrower interests and interest of general unsecured creditors diverge, and on those issues, a Borrowers Committee would be active, that would principally focus, I think, on the plan and the disclosure statement in the event that there were some kind of third party claim that no other entity could pursue due to conflicts, a Borrowers Committee conceivably can be asked to do that. That's what happened in First Alliance. But, the suggestion that a Borrowers Committee's role should be narrow is one that the borrowers completely understand and accept, and we think it would be appropriate to go forward on that basis. If the Court has any questions, I'd be happy to

answer them.

THE COURT: No, I don't. Mr. Brady, yeah -

MR. BRADY: Just a couple of points.

THE COURT: Sure, I'll keep it going, that's fine.

MR. BRADY: Just a couple of points, Your Honor. One, we can't stress enough that there's no evidence before the Court in counsel's presentation. I ask Your Honor to take judicial notice of a number of things, but typically that's the result of having failed to put on a case and evidence, and the movants have failed to do that here. The reference was made to Federal Mogul and Dow and how in those instances there has not been a judgment necessarily with respect to liability. Your Honor, Federal Mogul and Dow filed bankruptcy because of the claims being asserted against them, because of the tort claims. American Home did not file bankruptcy because of borrower claims against it. It filed bankruptcy for a host of reasons I don't need to go into now, but the claims of borrowers against American Home did not drive this filing. Recision, Your Honor, much has been made about whether the Borrower Committee, if appointed, could in some way impact the ability of borrowers to obtain recision. Again, Your Honor, virtually all of the loans are sold or in the case of the Bank of America collateral, control's been turned over to Bank of America, pursuant to a settlement approved by the Court. The debtor would have no ability to address those. Really, the

only pool of loans that remains are in connection with the JPM facility and that's the subject of a motion for relief from stay. Counsel indicated that a TILA finding by a court, a violation of TILA could be binding on a successor. Well, again, nothing that's happened in the bankruptcy or in the plan would impact that. The 363(o) protections were in the orders entered by this Court and they've now been added to the plan. With respect to destruction of documents, a number of hearings have been held before this Court where the debtor has taken great pains and at great expense protected and preserved the files that needed to remain. We have changed the plan to indicate that the Trustee no longer has the unilateral right to destroy documents. That must be on notice and a hearing before this Court. Counsel indicates that AHM could have served all borrowers who had teaser rates or all borrowers who had option arms because, their position is, those often resulted in tort claims. There is no evidence, Your Honor, before the Court that borrowers who were the subject of teaser rates or who purchased option arms that the generation of claims from those products was higher than any other product. There's just no evidence before the Court. Again, we've removed the debtors from the injunction. We have clarified the exculpation provisions to provide that we are not in any way attempting by this plan to impact borrowers' rights with respect to third parties. And with respect to the liquidation

of their claims, they really have an option, Your Honor. A number have come forward and sought relief from stay. Your Honor has granted it in each and every instance. I expect Your Honor would continue to grant borrowers' requests for relief from stay. So the borrower may litigate their claims in a court of competent jurisdiction or if they choose, they can attempt to litigate their claims in effect through the claims administration process here. The borrowers have those options, but the fact is, if a borrower wants to have their claim litigated and resolved in a court of competent jurisdiction that may be more convenient to them, that option exists, and Your Honor, I'm sure, would prefer to have those litigated elsewhere. So, the plan does not do anything to prevent a borrower from being able to exercise their rights both against the debtors to liquidate their claims and against third parties.

THE COURT: Thank you, Mr. Brady. Anyone else? Mr. Indelicato?

MR. INDELICATO: Yes, Your Honor, very briefly. I just want to address one other thing, and this I would like to just inject a little bit of reality into the proceeding because we are counsel to the liquidating trust in New Century, and as they mentioned, if there is a TILA violation asserted against a trust, it can be binding on the successor. Your Honor, in every case in which we are representing the

post-confirmation committee or trustee in a subprime mortgage or all-day mortgage lender, we worked hard to alleviate from the Court and the system the foreclosure proceedings. So both in New Century and Resume in which we're counsel and I think one other, we've had submitted to the Court orders for blanket relief from the stay so that there no longer needs to be relief from the stay to proceed with foreclosure proceedings, and we've assured both the borrowers and the owners of the mortgages that that will be dealt with in a court of competent jurisdiction outside the jurisdiction of the Bankruptcy Court and all rights are preserved.

THE COURT: Have you granted blanket release from the automatic stay for borrower claims against the estate?

MR. INDELICATO: Well, Your Honor, they're subject to the claims resolution process -

THE COURT: So, no.

MR. INDELICATO: So the answer is no, we're dealing with them in a claims resolution process.

THE COURT: Well, how is that at all relevant to the formation of a Borrowers Committee?

MR. INDELICATO: Well, Your Honor -

THE COURT: If you've helped the banks?

MR. INDELICATO: I'm just dealing with the issue that they raised about the need for recision and the ability to sue the trustee. What you would be creating is a potential where

the liquidating trustee is going to be sued throughout the country and you're going to increase enormously the costs of the post-confirmation estate. That's the only point I want to raise. It goes into the reality of the relief they're seeking in the plan, which is what I said before is, they have unsecured claims and they have rights against third parties. Those rights against third parties cannot be adjudicated in this proceeding.

THE COURT: Well, you basically want me to prejudge the points that they're raising as a basis.

MR. INDELICATO: I'm only responding to their argument, Your Honor. I didn't raise an - I'm just putting a counter argument to why they need the Borrowers Committee to negotiate that in the plan.

THE COURT: All right.

MR. INDELICATO: I'm not asking the Court to prejudge anything.

THE COURT: All right, so your point is, it's not a valid basis for forming a committee because in all likelihood - Well, it would be incredibly expensive.

MR. INDELICATO: That's correct, Your Honor. Thank you.

THE COURT: Thank you. Anything further by any party? Just give me a moment. All right. Well, I appreciate the argument. I am somewhat troubled by the lack of evidence,

but I think the Court can make a decision one way or the other based on, frankly, its experience in this case and the facts and circumstances that have come to the Court's attention over the last 14 months. I'm going to stress that I think the movants have said several times that they were not in any way criticizing counsel for the Committee or the Committee itself and that they simply were taking a position that the Committee in effect was inherently conflicted or did not have sufficiently in front of it the issues that were unique to the borrowers and as a result, not because the Committee wasn't doing their job but because of inherent difficulties, they weren't adequately representing the borrowers. I agree. And again, with no personal or professional criticism of anybody involved on behalf of the Committee. I don't believe that the borrowers who are asserting claims against the debtor in this estate are adequately represented by the Creditors Committee or by themselves. Based on the unique nature of a number of the borrower claims that are different, obviously since they're unique, but to be specific, different from the general nature of the claims of most of the unsecured creditors, most of whom are financial institutions, I think there are fundamental distinctions between those claims. The numerosity of the claimants, even 450, is a large number of claimants, and I think, frankly, that the universe of claims may be larger, but I don't think I need to get into that because I

think 450 claims is a lot of claims, a lot of claimants, and frankly, I think the majority of these people are appearing *pro se*. It is extremely difficult for any person to appear *pro se* in court. Ms. Rush, in particular, has done a very good job doing her best to navigate the complexities of the Bankruptcy Code. I've seen attorneys with 20 years experience in other fields come into Bankruptcy Court and not do as good a job because this is a complex and often byzantine to what my old law firm used to call the real lawyers, but it is a very specialized area of the law and a *pro se* person with a sophisticated issue is inherently at a disadvantage, and I think it's just common sense that the vast majority of these people are financially unable to hire counsel, and we're talking about people who are on the verge of losing their homes, and I think the Court can take notice of that, both the increase in home ownership rates in the last five years from something like 62 to 69 percent and the inherent problems that have resulted from that. Going through the discretionary matters, I think, frankly, all of them except maybe for a few support formation of the Committee. Clearly this is a sophisticated large complex case. I don't find the motion at all untimely based on the facts and circumstances of this case. I'm cognizant of how delay would be expensive and requiring additional interaction with a committee that is formed will increase the claims of Mr. Brady's firm, of Mr.

Indelicato's firm and other firms that are getting paid from the estate, but I think I have to balance that against the potential upside, and I think the Court, as I indicated, can fashion a remedy that would, while not eliminating that expense, hopefully limit it significantly. Yes, it will result in a delay in confirmation. Now, we're 14 months into a liquidating case. I'm not moved by delaying confirmation whatsoever other than the issue of a continued expense, which I just dealt with. Again, I don't feel that by virtue of the way it was formed and the uniqueness of the borrowers' claims that the Committee adequately can represent these interests and the individuals are not in a position to represent their own interests, and again, I think, there may be - and this goes to this issue about the Committee being able to represent these people, I think there are a potential for unique remedies on behalf of the borrowers, and, you know, the disclosure statement and plan are complex, not just the case, but the issues in front of borrowers are complex, and they have to be because it's a complex company and it's a complex plan, but it inherently makes it difficult for unsophisticated people familiar with the Bankruptcy Code to figure out what's going on. I've read plans. I'm not saying it's this plan. I've read plans and when I get to the seventh cross-indexed definition I don't know what's going on any more, not that I'm brilliant, but I've been doing this for awhile. All right, so

here's what I'm going to do. I'm going to direct Mr. McMahon's office to appoint a trustee - excuse me, to appoint a committee of borrowers. The U.S. Trustee always has discretion in forming a committee both in how it does it and who it puts on it, and I want to emphasize that I think this case presents probably the most challenging committee formation meeting in my experience, and I understand that. I'm going to give the U.S. Trustee's Office very, very broad discretion. Certainly, I don't feel that serving 1.5 million people with notice of a borrower formation meeting would be appropriate or required. I'll leave it to you, Mr. McMahon, and your office whether it's filed borrower claims, the current claims of 450 people, publication notice at the debtors' expense, however you want to work with the debtor to figure it out. I'm going to give your office the broadest possible discretion in how you do that. And again, I mean the way that works is, if somebody's got an issue with it, they can bring it to the Court's attention and we'll deal with it then. I'm not at this time going to reschedule the disclosure statement, and I am not at this time going to put any limitations on counsel to a Borrowers Committee, not because I may not do that, but because until we have counsel to that - until we have a Committee and the Committee can have proposed counsel, I'm really not in a position to deal adequately with what the limitations might be. So, we have a hearing in this

matter two weeks from today at 10 a.m. At that time I'm going to hold a status conference in connection with the formation of the Borrowers Committee. I would hope that a Committee is formed and has proposed counsel by then. Even if they don't, I will deal with the issues of scope of work, possible limitations on fees and timing. I will schedule a disclosure statement hearing on the 22nd, and I will not move it again without the consent of the primary parties. This case does need to move forward, but I think a Borrowers Committee needs sufficient funds and sufficient time to have a reasonable say in what appears before the Court. So, I'd ask counsel who filed the motion simply to enter a fairly bland order directing the Office of the U.S. Trustee to appoint a committee of borrowers pursuant to - for the reasons set forth on the record at the hearing. I think that's all we need. Any questions? Obviously, the disclosure statement is adjourned without date but a date will be set in two weeks, on the 22nd of October. I think we have a 10 a.m. hearing that day. At least that's what my schedule shows. It's an omnibus. Is that right? Okay, that's right. Any questions. All right, thank you very much. I appreciate the -

MS. ROMERO (TELEPHONIC): Your Honor, I have a clarification question. This is Martha Romero on the phone representing the California taxing authorities.

THE COURT: Yes, ma'am.

MS. ROMERO (TELEPHONIC): The scheduled hearing that you just mentioned on October 22nd at 10 a.m. is just for the purpose of setting a new date for the disclosure hearing?

THE COURT: It will not -

MS. ROMERO (TELEPHONIC): I mean, one of the matters is to schedule a new date for the disclosure hearing?

THE COURT: Yes. The disclosure hearing itself will not go forward on October 22nd.

MS. ROMERO (TELEPHONIC): Okay, and that hearing's at 10 a.m.

THE COURT: Ten a.m. Eastern, yes, ma'am.

MS. ROMERO (TELEPHONIC): Okay, thank you so much.

THE COURT: You're welcome. Any other questions? Okay, thank you, the hearing's adjourned.

(Whereupon at 12:06 p.m., the hearing in this matter was concluded for this date.)

I, Elaine M. Ryan, approved transcriber for the United States Courts, certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s/ Elaine M. Ryan October 13, 2008

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